Office of the Attorney General
LEONARDO M. RAPADAS
287 West O'Brien Drive
Hagåtña, Guam 96910 ● USA
(671) 475-3324 ● (671) 472-2493 (Fax)
for defendant Suba

IN THE DISTRICT COURT OF GUAM

JAMES L. ADKINS,

Plaintiff,

vs.

PAUL SUBA, (former) Chief of Police; D.B. ANCIANO and **SERAFINO ARTUI**, et al.,

Defendants.

Civil Case No. 09-00029

DEFENDANT SUBA'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

On November 24, 2010, plaintiff James Adkins was granted leave to file a second amended complaint ("SAC"). *See Minute Order on Motion to Amend/Correct Amended Complaint*, Doc. 104 dated November 24, 2010 (entered on the docket November 26, 2010) ("Motion to amend first amended complaint is granted in its entirety."). Without written analysis or further explication, the magistrate judge ruled from the bench that plaintiff's proposed second amended complaint had cured the pleading deficiencies identified in the first amended complaint under the standard announced by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. ---, 129 S.Ct. 1937 (2009).

Plaintiff's second amended complaint reframes previously dismissed first amendment claims against Officers Serafino Artui and D.B. Anciano; seeks to reintroduce claims of supervisory liability against former Chief of Police Paul Suba; and adds claims against two new defendants based on events that occurred subsequent to the filing of his original complaint. Not alleged to be a personal participant in any of the events before or after plaintiff's arrest, the only thing the defendants have in common with one another are that they were all supervised by then-chief of police Paul Suba.

Supervisor Liability – Standard of Review

This court has previously determined that it is "is unable to find as a matter of law that there is a clearly established right to take photographs at an accident scene." *Order and Opinion*, Doc. 78, page 16 (Aug. 24, 2010). Nevertheless, the second amended complaint alleges former Chief Paul Suba is liable for failing to supervise police officers with respect to the constitutional rights of persons taking photographs at accident scenes. Mr. Adkins separately seeks to hold Chief Suba liable in his supervisory capacity for failure to train or supervise two separate police department employees with respect to preserving and processing evidence seized during the course of an arrest, which he contends resulted in the destruction of his personal property.

"Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. ----, 129 S.Ct. 1949. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' 550 U.S., at 555, 127 S.Ct. 1955. Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' " *Id*. (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557, 127 S.Ct. 1955 (2007)).

> [S]upervisory personnel are generally not liable under § 1983 for the actions of their employees under a theory of respondeat superior and, therefore, when a named defendant holds a supervisorial position, the causal link between him and the claimed constitutional violation must be specifically alleged. *See Fayle v. Stapley*, 607 F.2d 858, 862 (9th Cir. 1979); *Mosher v. Saalfeld*, 589 F.2d 438, 441 (9th Cir. 1978). Vague and conclusory allegations concerning the

> involvement of official personnel in civil rights violations are not sufficient. *See Ivey v. Board of Regents*, 673 F.2d 266, 268 (9th Cir. 1982).

Magarrell v. Mangis, 2009 WL 2579619 * 4 (E.D. Cal. 2009). "In *Ashcroft v. Iqbal*, --- U.S. ---, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), the Supreme Court explained that in a section 1983 action, 'the term supervisory liability is a misnomer,' since "[e]ach Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Id.* at 1949. [The plaintiff] must therefore adduce evidence that [the supervisors] themselves acted or failed to act unconstitutionally, not merely that a subordinate did." *Simmons v. Navajo County, Ariz.*, 609 F.3d 1011, 1020-21 (9th Cir. 2010) (additional internal quotations and citation omitted; editorial brackets in original). "Supervisory liability, however, will ordinarily not be imposed based upon a 'single incident, or a series of isolated incidents.' " *Olson v. Sherburne County*, 2009 WL 3711548 * 6 (D. Minn. 2009) (quoting *Howard v. Adkinson*, 887 F.2d 134, 138 (8th Cir. 1989)).

The Renewed Supervisory Liability Claims Against Suba Remain Materially Deficient.

With respect to Mr. Adkins' claim of supervisory liability involving the actions of Officers Artui and Anciano for pulling Mr. Adkins over and ordering him to desist taking photographs, and charging him with "failure to comply" and "obstructing governmental operations" when he refused, Mr. Adkins posits that the Guam Supreme Court's decision in *People v. Maysho*, 2005 Guam 4, authored by the Chief Judge of this court when she was an associate justice of the Guam Supreme Court, placed then-Chief Suba on notice that GPD has a history of abusing the "failure to comply" statute. But Mr. Adkins' second amended complaint still presents nothing more than "vague and conclusory allegations," and a "series of isolated incidents." Plaintiff says:

> Upon information and belief, Suba knew of prior instances where officers arrested individuals and charged them with obstruction of governmental function

> and "failure to comply" without sufficient evidence to support the charges. Specifically, Suba knew or should have known of the case where Anciano arrested an individual and took the individual into custody for "failure to comply" after the two exchanged words, since Anciano's actions were the subject of a Guam Supreme Court decision in People v. Maysho, 2005 Guam 4.

SAC ¶ 34. Although plaintiff has previously argued that his new complaint is replete with new factual allegations that might establish a claim of supervisory liability, *see generally SAC* ¶¶ 29 – 38, in fact there are none. The allegation "Suba knew of prior instances where officers arrested individuals and charged them with obstruction of governmental function and 'failure to comply' without sufficient evidence to support the charges" is just that, a conclusory allegation of a single isolated incident, that is legally insufficient to place a supervisor on notice of the need to correct a "systemic and department-wide lack of knowledge, training and supervision concerning the protection of individuals' First, Fourth, and Fourteenth Amendment rights." *SAC* ¶ 32. The *Maysho* decision provides no notice to any public official that there is a need to address a department-wide problem, specifically that the "failure to comply" or "obstructing governmental operations" statutes were being unconstitutionally applied by his subordinates.

First, the burden of proof needed to obtain any criminal conviction is of course higher than that required to *stop* someone. The fact that there was insufficient evidence to convict the criminal defendant in *Maysho* is not dispositive of the question whether there was lawful cause to stop Mr. Adkins. It certainly has no bearing on whether the police had probable cause to arrest him when, after arguing about his "right" to take photos from within the public road, he was ordered to step out of his vehicle and he retorted, "The only way I will get out is if I am under arrest." *SAC* ¶ 14. It is unreasonable to argue that a supervisory official would be on notice from the *Maysho* decision – involving an arrestee's failure to understand what was being asked of him

– that there is a constitutional need to train officers with respect to stopping someone before he can commit the offense of obstructing governmental operations and arresting that person when he categorically refuses to obey a lawful command to exit his vehicle. By Mr. Adkins' reasoning, every criminal case that is ever dismissed, *or reversed* after a trial would set a precedent for supervisory liability whenever that supervisor fails to implement new policies.

Second, unlike the facts presented in the case at bar, the trial court in *Maysho* obviously determined that Maysho's "failure to comply" was because Maysho did not understand what Officer Anciano was instructing him to do when Anciano was flagging him down. Just as importantly, Maysho may have been *unable* to comply. "Maysho may have failed to understand Officer Anciano's instruction to stop the van immediately, but he alleged that it was necessary to execute a safe stop in order to avoid cars located behind him from colliding with his van." *Id.*, 2005 Guam 4 ¶ 20. Mr. Adkins cannot and does not claim he was unable to comply with the police officers' directive to exit his vehicle before continuing their, as Mr. Adkins' puts it, "verbal exchange."[1]

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[1] The lawfulness of police ordering someone out of or back into their vehicle has previously been addressed. *See Defendants Serafino Artui's and D.B. Anciano's Motion to Dismiss & Supporting Memorandum of Law*, Doc. 30, pp. 12 – 16. "A law enforcement officer may order the driver out of a vehicle during a lawful traffic stop." *Lawyer v. City of Council Bluffs*, 361 F.3d 1099, 1105 (8th Cir. 2004) (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977)). There is no clearly established law to suggest on the facts of Adkins' complaint, embroiled in legal debate as he was with two police officers over his "right" to stop and take pictures of the scene of an accident, that it was unconstitutional to instruct him to step out of the car, particularly when he made it plain he was not going to comply with anything the officers said unless arrested. *See Dallas v. City of Okolona, Mississippi*, 1999 WL 33537145 * 6 (N.D. Miss. 1999) ("It is well-settled that police officers may constitutionally order drivers and passengers to exit or remain inside a vehicle during a routine traffic stop as a precautionary safety measure.") (citing *Maryland v. Wilson*, 519 U.S. 408, 412 (1997); *Pennsylvania v. Mimms*, 434 U.S. 106, 109-110 (1977); *Ohio v. Robinette*, 519 U.S. 33, 38 (1996); *Macias v. Raul A.*, 23 F.3d 94, 98 (5th Cir.1994); *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994), *cert. denied*, 514 U.S. 1134 (1995)).

Third, and absent conscious ratification, a single isolated incident will rarely give rise to a finding of supervisory liability. "Culpability is established by showing that the supervisor was deliberately indifferent to acts by others which the supervisor knows or reasonably should have known would cause others to inflict the constitutional injury. The deliberate indifference standard is objective in nature…When a plaintiff brings suit against defendants as individuals, plaintiff need only show that the defendants' acts were the product of reckless or callous indifference to his constitutional rights **and that they in fact cause**[] his constitutional deprivation." *Adkins v. Guam Police Dept.*, 2010 WL 3385180 * 15 (D. Guam 2010) (citing *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 567 (1st Cir.1989) (emphasis added)). Mr. Adkins concurs that the issue is whether Chief Suba was deliberately indifferent to a known problem of constitutional magnitude. *See SAC* ¶ 33 (asserting that Suba's inaction in failing to enforce or update GPD general orders "constitutes conduct that shows a reckless, callous, and deliberate indifference to the rights of others, including plaintiff, … and to the need for more or different training, supervision, or discipline of peace officers at GPD"). *Compare*, *Haynes v. City and County of San Francisco*, 2010 WL 2991732 * 3 (N.D. Cal. 2010) ("Evidence of a city's failure to train a single officer, however, is insufficient to establish a municipality's deliberate policy.") (citing *Blankenhorn v. City of Orange*, 485 F.3d 463, 484-85 (9th Cir. 2007)).[2]

[2] Earlier in this case, the magistrate-judge stated "it is important not to confuse the concept of municipal liability for the failure to train or supervise employees with the concept of supervisory liability. A supervisory liability claim can exist without a finding of municipal liability for the failure to train or supervise employees."*Adkins v. Guam Police Dept.*, 2010 WL 3385180 * 15 (D. Guam 2010) (footnote omitted). The second part of the magistrate-judge's statement is true enough. "Generally, liability exists for supervisory officials if they personally participated in the wrongful conduct or breached a duty imposed by law. In contrast, municipal liability depends upon enforcement by individuals of a municipal policy, practice, or decision of a policymaker that causes the violation of the Plaintiffs' federally protected rights." *McGrath v. Scott*, 250 F.Supp.2d 1218, 1222-23 (D. Ariz. 2003) (citations omitted). "As with § 1983 municipal liability," however, "§ 1983 supervisory liability cannot be based on

Mr. Adkins asserts that "Suba's policy of lack of training and supervision and failing to discipline police officers for arresting individuals without sufficient cause constitutes a policy that is so deficient it is a repudiation of the constitutional rights and the moving force of the constitutional violations against plaintiff." *SAC* ¶ 38. But that is merely a legal conclusion borrowed from case law, in particular, *Redman v. County of San Diego*, 942 F.2d 1435, 1446-47 (9th Cir. 1991). A plaintiff must still allege sufficient facts from which a causal connection may plausibly be drawn.

> The requisite causal connection may be established when an official sets in motion a "series of acts by others which the actor knows or reasonably should know would cause others to inflict" constitutional harms. *Preschooler II v. Davis*, 479 F.3d 1175, 1183 (9th Cir. 2007) (denying motion to dismiss on allegations that supervisors knew of alleged harm and turned "a blind eye"). For example, supervisory officials may be liable without overt personal participation in the offensive act if they implement a policy so deficient that the policy "itself is a repudiation of constitutional rights" and is "the moving force of the constitutional violation." *Redman,* 942 F.2d at 1446-47. Sweeping conclusory allegations will not suffice to prevent summary judgment. *Id.* A supervisor may be liable for an [constitutional] violation if he or she was made aware of the problem and failed to act. *Jett v. Penner*, 439 F.3d 1091, 1098 (9th Cir. 2006).

Horn v. Hornbeak, 2010 WL 1267363 * 13 (E.D. Cal. 2010) (quoting *Redman*).

The Guam Supreme Court's decision in *Maysho* reversed a conviction for "failure to comply" due to insufficient evidence. Notably, and unlike the case at bar, the decision did not

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respondeat superior," *West v. Rahr*, 2009 WL 3103997 * 3 (W.D. Wash. 2009), the analysis of the *elements* of a claim of supervisory liability for "failure to train" or a municipal liability "custom or policy" claim will frequently be the same. In the absence of a direct participation by the supervisory or explicit municipal policy previously determined to be unconstitutional, both will require knowledge of and deliberate indifference to unconstitutional practices beyond isolated incidents of an employee's wrongdoing. *See, generally, Murphy v. Bitsoih*, 320 F.Supp.2d 1174, 1195-96 (D. N.M. 2004) ("Imputation of constructive notice requires a showing that the underlying unconstitutional misconduct was 'so widespread or flagrant that in the proper exercise of its official responsibilities the governing body should have known of it.' ") (quoting *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998)). Mr. Adkins' solitary citation to the factually and legally distinguishable *Maysho* decision is insufficient as a matter of law to place anyone on notice of department conduct "so widespread or flagrant" as to establish either supervisory liability or, were it applicable in Guam, municipal liability.

involve a charge of obstructing governmental operations. The case certainly does not put even the most careful reader on notice of "rampant" constitutional violations within the department wherein police officers were alleged to be abusing the "failure to comply" and "obstruction of governmental operations" laws in the "systemic" manner suggested by Mr. Adkins.

> The evidence relied upon is nothing more than *respondeat superior*: The supervisor was in a position to know, should have known and should have corrected. Plaintiff, however, must establish the "causation" component. The inquiry into causation "must be individualized" and focused on the duties and responsibilities of the individual defendant whose acts or omissions are alleged to have caused a violation. *Leer v. Murphy*, 844 F.2d 628, 633-34 (9th Cir. 1988). Where a plaintiff seeks damages against the individual, "[w]e must focus on whether the individual defendant was in a position to take steps to avert the [incident], but failed to do so intentionally or with deliberate indifference." *Leer*, 844 F.2d at 634. **Plaintiff cannot hold these defendants individually liable for damages merely by showing that, because of high-profile litigation or for other similar reasons**, they must be aware of the prison conditions of which plaintiff complains.

Horn, 2010 WL 1267363 * 17 (editorial brackets in original; emphasis in bold added). Evidence of one reversed conviction on distinguishable facts is simply not enough to establish supervisory liability for systemic department-wide constitutional violations. There must be more.

Guam Police Department General Orders Do Not Create Clearly Established Law.

Mr. Adkins appears to be asserting that Suba is liable in a supervisory capacity because Anciano and Artui "clearly violated" GPD General Orders relating to stopping and questioning of individuals. *See SAC* ¶ 31.A ("Anciano and Artui clearly violated G.O. No. 92-30"); *and see, Reply Memo. in Support of Motion for Stay of Decision*, Doc. 93, page 2 ("Further, plaintiff has added new claims against Anciano and Artui based on their violations of the Guam Police Department's general orders…."). But the additional allegations asserted against Anciano and Artui, even if true, are of no consequence in terms of deciding whether Mr. Adkins has stated a claim of violation of clearly established constitutional law against Suba. "Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." *Davis v. Scherer*, 468 U.S. 183, 194 (1984) (footnote omitted); *Elder v. Holloway*, 510 U.S. 510, 514 (1994) ("*Davis*, in short, concerned … this entirely discrete question: Is qualified immunity defeated where a defendant violates any clearly established duty, including one under state law, or must the clearly established right be the federal right on which the claim for relief is based? The Court held the latter.") (citations omitted). *See also Devereaux v. Abbey*, 263 F.3d 1070, 1075 (9th Cir. 2001) (en banc) ("mere allegations that Defendants used interviewing techniques that were in some sense improper, *or that violated state regulations*, without more, cannot serve as the basis for a claim under § 1983") (emphasis added). If Mr. Adkins is alleging former Chief Suba is liable for failing to enforce existing general orders, the law is clear that those orders do not create clearly established law and therefore add nothing to the court's prior analysis of Mr. Adkins' claims.

What Mr. Adkins is actually saying is that Suba is liable not because he failed to enforce existing general orders promulgated under local law, but because he failed to update them in light of evolving case law, although he cannot point to any case law in particular. *See SAC* ¶ 32 ("The caselaw on First, Fourth, and Fourteenth Amendment rights has changed drastically since the mid-1990's and even more recently such law continues to evolve and change through Guam and U.S. Supreme Court decisions."); *see esp.*, ¶ 33 ("Suba failed to adopt appropriate and current general orders or directives concerning individuals' First, Fourth, and Fourteenth Amendment rights and failed to mandate appropriate and current training and supervision…."). Considering that the court has held that the constitutional rights of motorists to stop and take photographs at accident scenes is not clearly established on the facts of his first amended complaint, if Mr. Adkins is alleging the failure to contemporaneously update and modernize general orders as the caselaw "continues to evolve," it is difficult to envision what he has in mind that might have yielded a different result.[3]

Other than the already distinguished *Maysho* decision, Mr. Adkins has failed to allege non-conclusory *facts* tending to suggest that Chief Suba was on notice of the need for new and updated policies. A public official may be held personally liable for alleged unconstitutional conduct only if the rights at issue were "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Whether an official is entitled to qualified immunity is decided in "the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). In deciding the question whether Chief Suba was on notice of department-wide failings in police procedures, the *Maysho* decision does not place Suba on notice of the need to promulgate general orders that would have anticipated Mr. Adkins initial stop (for, as he contends, simply taking

[3] Mr. Adkins' assertion at ¶ 32 of his complaint, that "the caselaw has changed drastically since the mid-1990's and even more recently such law continues to evolve and change" actually cuts against him in assessing the merits of *all* of the defendants' claims of qualified immunity, because in the absence of clearly established controlling precedent, a police officer's lack of constitutional clairvoyance generally does not defeat qualified immunity. *See Pierson v. Ray*, 386 U.S. 547, 557 (1967) ("We agree that a police officer is not charged with predicting the future course of constitutional law."), overruled on other grounds, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *accord Procunier v. Navarette*, 434 U.S. 555, 562 (1978); *cf. Safford Unified School Dist. No. 1 v. Redding*, 557 U.S. ----, 129 S.Ct. 2633, 2644 (2009) ("We think these differences of opinion from our own are substantial enough to require immunity for the school officials in this case. We would not suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear. That said, however, the cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law."); *accord Mashburn v. Yamhill County*, 698 F.Supp.2d 1233, 1257 (D. Or. 2010) (canvassing divergent views in the case law and concluding "given the lack of directly controlling and relevant precedent," that defendants were entitled to qualified immunity).

photographs) and eventual arrest for failing to exit his vehicle. That Chief Suba *could have* promulgated general orders whereby police would have been specifically instructed to manage an accident scene differently in deference to passers-by with cell phone cameras, for example, by placing yellow police tape all around the accident and establishing a perimeter with officers directing traffic, is beside the point, and does not elevate the failure to do so to the level of a constitutional tort. *Compare Dempsey v. Town of Brighton*, 749 F.Supp. 1215, 1228 (W.D. N.Y. 1990) ("The fact that other competent officers might have acted differently is not controlling.").

Supervisory Liability Claims Based on the Actions of Officers Taitano and Rodriguez

John F. Taitano and Jesse P. Rodriguez are identified in the second amended complaint as persons who allegedly "tampered with plaintiff's cell phone, which tampering resulted in the deletion of photographs and other information from plaintiff's cell phone." *SAC* ¶¶ 9, 10. Mr. Adkins' arrest occurred on October 4, 2009 and other than his conclusory claim of supervisory liability against former Police Chief Paul Suba, his original lawsuit involved only defendants Artui and Anciano. *See SAC* ¶¶ 12 – 20. The new factual allegations against Taitano and Rodriguez are based on events that did not occur until *after* his lawsuit was filed. *See Motion to Amend*, Doc. 89, page 6 ("The amendment to add new defendants and new claims arise from facts and circumstances that occurred after the filing of plaintiff's FAC."). The amended complaint expressly states that the new defendants' actions were taken not at the direction of Chief Suba, but GPD Legal Counsel Jim Mitchell. *See* SAC, Doc. 103, ¶ 24 ("On December 7, Taitano signed out the cell phone at 3:05 p.m. for 'retrieval of evidence.' On the same day, at 3:15 p.m. Rodriguez signed out the cell phone for 'evidence analysis'. The cell phone was relinquished to Rodriguez 'by direction and verbal standing instruction by Mr. Jim Mitchell. Over an hour later, at 4:35 p.m., the cell phone was returned by Rodriguez to Taitano."). There is no causal connection between the initial seizure of Mr. Adkins' cell phone in October by Officers Artui and Anciano, and the alleged tampering in December two months later, after his lawsuit was filed, by two different officers engaged in evidence analysis at the direction of GPD legal counsel Jim Mitchell, nor does Mr. Adkins allege there is. Further, Mr. Adkins has expressly disavowed asking the court to infer some kind of conspiracy amongst the defendants he has named based on events two months apart involving different actors joined only by the fact that they shared the same supervisor. There are simply no facts alleged tending to establish a plausible inference that Chief Suba was on notice of and deliberately indifferent to any department-wide need to train or supervise GPD evidence technicians differently.

At ¶ 25 of his second amended complaint, Mr. Adkins states, "Suba's failure to return plaintiff's cell phone constituted an unlawful seizure of plaintiff's cell phone camera since the Attorney General had declined prosecution and there was no legal basis for any 'evidence analysis' or continued retention of the cell phone." Mr. Adkins will be unable to cite any clearly established law in support of the argument that it is unconstitutional to attempt to analyze the contents of a cell phone still in police custody after his civil suit was filed, even if as Mr. Adkins alleges, "Suba knew, or should have known, of the Prosecution Decline Memorandum and should have ordered the return of the cell phone camera to plaintiff." *SAC* ¶ 25. At best, plaintiff's "knew or should have known" allegations assert nothing more substantive than simple negligence. Negligence, of course, is not actionable under § 1983. "Where a government official's act causing injury to life, liberty, or property is merely negligent, no procedure for compensation is constitutionally required." *Daniels v. Williams*, 474 U.S. 327, 333 (1986) (internal quotation and citation omitted).

Even assuming his charge of cell phone tampering were true, and that more than simple negligence were involved, it is not at all clear that any of the defendants' conduct would have constituted either a prior restraint or retaliation in violation of Mr. Adkins' clearly established constitutional rights in violation of the First, Fourth and Fourteenth Amendments. *See McCormick v. City of Lawrence*, 325 F.Supp.2d 1191, 1206 (D. Kan. 2004) ("Even if Plaintiffs have alleged a constitutional violation, however, the court determines that it is not clearly established that destruction of recordings constitutes violation of the First Amendment.") (citations omitted); *Dreibelbis v. Scholton*, 2006 WL 1626623 * 4 (M.D. Pa. 2006) ("[I]t is less than clear that the destruction of a videotape recording … constitutes a violation of the First Amendment.").

Most important to the analysis of the question of Chief Suba's supervisory liability for the actions of Rodriguez and Taitano, even more than the preceding analysis with respect to the claims of failure to train and supervise with respect to stopping and arresting picture taking passers-by at accident scenes on the facts involving Artui and Anciano, Mr. Adkins asserts no non-conclusory facts establishing any kind of causal connection between Rodriguez and Taitano's alleged cell-phone tampering and anything that should have put Chief Suba on notice that there was any constitutional problem within the department that needed to be addressed. The allegations related to alleged cell-phone tampering at ¶¶ 23 – 28; 44; 45; 55; 56; and 78 – 87 of the second amended complaint are devoid of any reference to any facts from which to impute direct participation or deliberate indifference on Suba's part to constitutional failings within the department.

Again, "when a named defendant holds a supervisorial position, the causal link between him and the claimed constitutional violation must be specifically alleged. Vague and conclusory allegations concerning the involvement of official personnel in civil rights violations are not sufficient." *Magarrell v. Mangis*, 2009 WL 2579619 * 4 (E.D. Cal. 2009). The plaintiff must allege "that the supervisors themselves acted or failed to act unconstitutionally, not merely that a subordinate did." *Simmons v. Navajo County, Ariz.*, 609 F.3d 1020-21 (internal quotations and editorial brackets omitted). "Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 556 U.S. at ----, 129 S.Ct. at 1948.

There is not even a whisper of a suggestion in the second amended complaint that Chief Suba was deliberately indifferent to any known or reasonably foreseeable constitutional harm likely to occur within the department with respect to the proper handling and disposition of evidence that had been seized during the course of an arrest. *See again*, *Murphy v. Bitsoih*, 320 F.Supp.2d at 1195-96 ("Imputation of constructive notice requires a showing that the underlying unconstitutional misconduct was so widespread or flagrant that in the proper exercise of its official responsibilities the governing body should have known of it.") (internal quotation omitted). Mr. Adkins' allegations of failure to immediately return his cell-phone after the Attorney General had declined prosecution, alleged cell-phone tampering after his lawsuit was filed, and alleged destruction of the cell phone's contents during the attempted analysis of its contents fail, as a matter of law, to state a claim for supervisory liability.

Conclusion

Mr. Adkins' second amended complaint alleging supervisory liability against former Chief of Police Paul Suba is due to be dismissed because the *Maysho* decision he cites is factually and legally distinguishable, and is insufficient as a matter of law to place a reasonable public official in a supervisory position on notice of the need to address department-wide violations of constitutional dimension based relative to the actions of defendants Artui and Anciano. The allegations of cell-phone tampering seeking to impute supervisory liability for the actions of defendants Taitano and Rodriguez do not even rise to the level of respondeat superior. Chief Suba is due to be dismissed.

Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL
LEONARDO M. RAPADAS, Attorney General

By: ______________________________
ROBERT M. WEINBERG
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the forgoing on all counsel by hand delivery, or electronically with the Clerk of Court using the CM/ECF System to the following:

Anita P. Arriola, Esq.,
Arriola, Cowan & Arriola
259 Martyr Street, Suite 201
P.O. Box X,
Hagåtña, Guam 96910
Email: acalaw@teleguam.net

this 7th day of January, 2011.

OFFICE OF THE ATTORNEY GENERAL

____
ROBERT M. WEINBERG
Assistant Attorney General